Court of Appeals, State of Michigan

ORDER

People of MI v Randall Owen Couturier

Docket No. 252175

LC No. 02-010721; 02-010903

Kathleen Jansen
Presiding Judge

Christopher M. Murray

Pat M. Donofrio
Judges

On the Court's own motion, the January 25, 2005 opinion is hereby VACATED. The opinion contained the following clerical error: The opinion failed to list both lower court numbers 02-0100721 and 02-010903 on the opinion. A new opinion is attached which corrects the error as follows: LC No. 02-010721 and LC No. 02-010903.

For clarification purposes the following sentences were changed:

Thus, the prosecution has not established that this constitutional error was harmless beyond a reasonable doubt. *Carines, supra* at 774; *Cunningham, supra* at 657. Accordingly, we reverse and remand for a new trial.

Changed to:

The prosecution has not established that this constitutional error was harmless beyond a reasonable doubt with regard to any of the convictions. *Carines, supra* at 774; *Cunningham, supra* at 657. Accordingly, we reverse defendant's convictions from both lower court nos. 02-010721 and 02-010903, and remand for a new trial.

STATE OF MICHIGAN COURT OF APPEALS

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Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 10, 2005
v	No. 252175 Bay Circuit Court
RANDALL OWEN COUTURIER, Defendant-Appellant.	LC No. 02-010721 LC No. 02-010903

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from jury trial convictions for four counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under thirteen years of age). Defendant was sentenced to four concurrent prison terms of 71 to 180 months. This case arises from allegations that defendant engaged in sexual contact with three children in a first-grade classroom where he was a volunteer and which was taught by his wife. We reverse and remand for a new trial.

Defendant first argues that the trial court erred in admitting testimony of the complainants under MRE 404(b). For each complainant, plaintiff sought admission under MRE 404(b) of the testimony of the other two regarding their allegations of abuse. In particular, plaintiff argued that the 404(b) evidence was admissible: (1) to show a plan, scheme, or system in doing an act; (2) to show that defendant had the opportunity to do the charged acts; and (3) to explain any delay in disclosure by the complainants. The trial court admitted the evidence for the purposes of showing a plan, system, or scheme in doing an act, as well as opportunity to commit the abuse. "The decision whether [404(b)] . . . evidence will be admitted is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW 2d 785 (1998). We find no abuse of discretion in the admission of the challenged testimony.

MRE 404(b)(1) provides as follows:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity,

> intent, preparation, scheme, plan, or system in doing an act, knowledge, identity or absence of mistake or accident when the same is material, whether such crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

A prosecutor who wishes to introduce evidence of other bad acts must first "offer the other bad acts evidence on something other than a character to conduct or propensity theory." *People v Sabin* (*After Remand*), 463 Mich 43, 55; 614 NW2d 888 (2000). "Second, the evidence must be relevant under MRE 402 as enforced through MRE 104(b) to an issue of fact of consequence at trial." *Id.* Next, the other acts evidence must meet the standards of MRE 403, which provides that evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by consideration of undue delay, waste of time, or presentation of cumulative evidence." Finally, the court may, upon request, provide a limiting instruction to the jury. *Sabin* (*After Remand*), *supra* at 56.

Applying the "plan, scheme, or system" analysis, *Sabin (After Remand), supra*, to the facts in the instant case, the record shows: (1) all three complainants/witnesses were female first-graders in the class in which defendant was a volunteer; (2) all three claimed that defendant touched the front of their genitals, under their clothes, that defendant's hand did not move, and that defendant did not say anything when he committed the act; (3) all three claimed that defendant touched them while they were sitting on defendant's lap taking a reading test or reading aloud; and (4) all of the incidents allegedly happened inside the first-grade classroom. It can be reasonably inferred from this evidence that defendant employed a common plan to molest children in the classroom where he volunteered.[1] While proof of a plan, scheme, or system is not directly relevant to any element of the charged offense, "other instances of sexual misconduct that establish a scheme, plan, or system may be material in the sense that the evidence proves that the charged act was committed." *Sabin* (*After Remand*), *supra* at 61-62. Here, as in *Sabin*, defendant denied that the acts occurred. Thus, the other acts evidence was relevant to support the inference that the charged acts were in fact committed.

The evidence, however, was not properly admitted to show opportunity. The prosecution's theory of relevance on this point appears to be that defendant must have had the opportunity to commit the charged act because there is evidence that he committed other acts under the same circumstances. The argument is circular, i.e., defendant must have had the opportunity to do it because he did it.

Certainly a strong potential for prejudice existed in presenting evidence of alleged sexual contact between defendant and each of the complainants. However, given the highly probative nature of the evidence in light of defendant's claims, this potential cannot be said to substantially outweigh the probative value of the testimony. Therefore, because the evidence was admissible

[1] "[D]istinctive and unusual features are not required to establish the existence of a common design or plan. The evidence of uncharged acts needs only to support the inference that the defendant employed the common plan in committing the charged offense." *People v Hine*, 467 Mich 242, 252-253; 650 NW2d 659 (2002).

under a plan, scheme, or system theory of relevance, we find no abuse of discretion. *People v Starr*, 457 Mich 490, 501; 577 NW2d 673 (1998).

Defendant next argues that because the conduct complained of was substantially different in each case, joinder of the charges was improper. We disagree. MCR 6.120(B) provides that "[o]n the defendant's motion, the court must sever unrelated offenses for separate trials." We review the denial of a motion to sever related charges for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). Whether defendant's charges are related is a question of law reviewed de novo. *People v Tobey*, 401 Mich 141, 153; 257 NW2d 537 (1977).

MCR 6.120(B) provides as follows:

> On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
>
> (1) the same conduct, or
>
> (2) a series of connected acts or acts constituting part of a single scheme or plan.

There is nothing in the language of the court rule that would limit the "single scheme or plan" language to those situations where the acts in issue are stages in a larger plan "'not attainable by the commission of any of the individual offenses.'" *People v McCune*, 125 Mich App 100, 103; 336 NW2d 11 (1983) quoting ABA Standard 13-1.2, commentary. Thus, where a defendant has "'devis[ed] a plan and us[ed] it repeatedly to perpetrate separate but very similar crimes,'" *Sabin* (*After Remand*), *supra* at 63,[2] joinder is permitted under MCR 6.120(B)(2). Because testimony by all three complainants was admissible as evidence in each case in chief under MRE 404(b), we see no abuse of discretion in the trial court's refusal to sever the charges.

Defendant next claims that the trial court denied his constitutional rights under the Confrontation Clause[3] by limiting his cross-examination of one of the complainants about notes that she wrote after the alleged abuse telling defendant that she loved and missed him. We agree.

This Court reviews de novo a claim of constitutional error. *People v Rodriguez*, 251 Mich App 10, 25; 650 NW2d 96 (2002). When a trial court commits an error that denies a defendant his constitutional rights under the Confrontation Clause, US Const, Am VI, Const 1963, art 1 § 20, "the reviewing court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

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[2] Quoting *State v Lough*, 125 Was 2d 847, 855; 889 P2d 487 (1995) (modification by *Sabin* Court).

[3] US Const, Am VI, Const 1963, art 1 § 20.

A defendant's constitutional right to present a defense and confront his accusers is secured by the right to cross-examination guaranteed by the Confrontation Clause. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). However, "[t]he right of cross-examination is not without limit . . . . The right of cross-examination does not include a right to cross-examine on irrelevant issues and may bow to accommodate other legitimate interests of the trial process or of society." *Id.* "A limitation on cross-examination preventing a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation. . . . [T]he burden of demonstrating its harmlessness rests with the prosecutor." *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996).

Here, as in *Adamski*, *supra*, there is no corroborating physical evidence or witness testimony. Thus, this case was also "a contest between the credibility of the complainant and the credibility of the defendant." *Adamski*, *supra* at 140. Given the age of this complainant and the extended time between when the incidents allegedly happened and the trial, effective cross-examination was difficult at best. The note in issue was substantially related to the complainant's credibility, and defendant should have had the opportunity to fully cross-examine her about its contents.

The prosecutor argues that defendant had sufficient opportunity to test this complainant's credibility with respect to certain incidents occurring at school. However, the source of this impeachment was defendant's wife, whose testimony may well have been discounted by the jury. Additionally, the excluded impeachment evidence was the only evidence related to the victim's feelings toward defendant close in time to the incident. The impeachment evidence from defendant's wife was not so closely connected to the incident that it rendered the constitutional error harmless. The prosecution has not established that this constitutional error was harmless beyond a reasonable doubt with regard to any of the convictions. *Carines*, *supra* at 774; *Cunningham*, *supra* at 657. Accordingly, we reverse defendant's convictions from both lower court nos. 02-010721 and 02-010903, and remand for a new trial.

Defendant next argues that the evidence regarding a Family Independence Agency (FIA) report concerning the half sister of one of the complainants and fact that the first-grade teacher considered contacting the FIA about one of the complainants was relevant to show that the complainant was more likely to fabricate the charges against defendant. We disagree. Clearly, this complainant's credibility was a "fact that is of consequence to the determination of the action." MRE 402. However, the intermediate inference defendant is attempting to draw (that a child from a troubled home is more likely to fabricate claims of sexual abuse) is extremely tenuous. Thus, the trial court did not abuse its discretion in ruling this evidence inadmissible.

Defendant next argues error requiring reversal occurred when a prosecution expert witness made mention of the recent sexual abuse scandal in the Catholic Church. Defendant does not claim that the prosecution's child sexual abuse expert went beyond the scope of proper testimony by, for example, testifying that the complainants had been sexually abused. *People v Lukity*, 460 Mich 484, 500; 596 NW2d 607 (1999). Defendant does argue, however, that by using the issue of the sexual abuse scandal in the Catholic Church as an example of delayed disclosure, plaintiff's expert introduced inflammatory material into the trial that diverted the jury's attention by appealing to their concerns about a serious sex abuse problem not in issue.

We disagree. We review this issue for plain error affecting substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

While posited as an issue of prosecutorial misconduct, this is essentially an evidentiary matter, i.e., was it error for the jury to have heard a reference to the ongoing sexual abuse scandal in the Catholic Church. We conclude that no error occurred. The expert's testimony only served to illustrate a psychological concept (delayed disclosure) that she was testifying about. Accordingly, the evidence served not to introduce an inflammatory element into the trial, but to give a concrete frame of reference for an abstract psychological concept, and thereby aid the jury in understanding an issue that was squarely before it.

Further, the scandal referenced is arguably common knowledge. Indeed, the utility of the reference is due, in great part, to the fact that this scandal has been so widely reported. Intuitively, it would seem somewhat illogical that a child who has suffered sexual abuse would not immediately report the abuse to a parent or some other figure to whom the child looks for protection. The exemplar serves to counter this impression by touching on an event that needs no lengthy exposition, and which directly contradicts what the expert identified as a misconception. *People v Peterson*, 450 Mich 349, 373; 537 NW2d 857, amended 450 Mich 1212 (1995) ("An expert may testify regarding typical symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim or to rebut an attack on the victim's credibility."). Accordingly, defendant has failed to establish error, plain or otherwise, with respect to testimony about the sexual abuse scandal in the Catholic Church.

We also reject defendant's assertion that a reference to Catholic Church made by the prosecutor in her closing argument was inflammatory and was, by implication, an improper civic duty argument. In context, the prosecutor's brief comments about abuse in the Catholic Church were related to her argument that sexual abuse can occur in public settings. This argument was made in response to defendant's position that given how busy the classroom was, it was impossible for the charged acts to have occurred. We see no improper implication or appeal to the civic responsibility of the jurors in the remarks.[4]

Defendant next argues that the trial court erred in scoring offense variable 13 at twenty-five points. Because we are reversing defendant's convictions and remanding for a new trial, we need not reach this issue. Similarly, we need not address defendant's claim of ineffective assistance of trial counsel or his claim that the trial court improperly withheld a portion of the bond money paid for by his wife for unspecified future counseling costs for the complainants.

[4] Even assuming that the prosecutor's comments were improper, any potential prejudice was dispelled when the trial court instructed the jury that questions asked, and statements made, by the prosecutor were not evidence. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995) (observing that "the judge's instruction that arguments of attorneys are not evidence dispelled any prejudice").

Reversed and remanded for a new trial.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Pat M. Donofrio